P R O C E E D I N G S

May 2, 1997 11:45 a.m.

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(The following proceedings were reported by Shelli Kozachenko:)

(The following proceedings were held outside the presence of the jury:)

THE COURT: Mr. Crist?

MR. CRIST: Yes, Your Honor.

THE COURT: It's quarter till, ten till 12:00, and I know that you're not going to go on for two-and-a-half hours nonstop.

MR. CRIST: I think that's fair to say.

THE COURT: Would you like me to call it to your attention when it's around 12:30 or something like that, or do you have any idea how long the first part of your presentation might take?

MR. CRIST: Your Honor, if you would like to recess for lunch at about 12:30, I will, you know, within a couple of minutes of that or so, try to do that.

THE COURT: All right. Very well. Recall the jury.

(The following proceedings were held in the

presence of the jury:)

THE COURT: Mr. Crist, you may proceed.

MR. CRIST: Thank you, Your Honor. Ladies and gentlemen of the jury, good morning.

THE JURORS: Good morning.

MR. CRIST: This will be my last chance to speak to you before you retire to deliberate. Mr. Motley and Mr. Wilner will have another chance, but this is my last chance, and so let me now take this opportunity to thank each of you for the attentiveness which you've shown over the course of the past four weeks, for the sacrifice which you've made away from your family, away from your jobs to come here and to decide this case, to hear the evidence.

And most of us have been here all four weeks too, been away from our family and away from our desks at least, but that's our job. I mean, that's what we're paid to do, but this isn't your job. This isn't what you're paid to do, and we certainly do appreciate your commitment. I state that on my own behalf, on behalf of my colleagues, and on behalf of my client.

I would also like to thank you as representatives of this community for the

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hospitality which we have received during our stay in Jacksonville. It's truly a beautiful city and we have enjoyed our stay here, although I'm sure all of us would rather be with our families. One favor I would have to ask of you with respect to perhaps continuing that hospitality is that as you may know, Cleveland needs a football team. Somebody seems to agree with me.

Fairly soon now, you are going to retire to deliberate on the evidence that has been presented to you by way of documents and by way of testimony, to deliberate on the law as Judge Nachman gives it to you, and bringing to bear on that the common sense which jurors are expected to bring into a courtroom and into a jury room.

There are not going to be any more documents, there won't be any more sidebars, there won't be any more testimony, and there won't be any more rhetoric from the lawyers, and I bet you're all going to be happy about that. I will.

As you go back in to deliberate this case, the ultimate issue that you're going to have to decide is whether or not someone who has chosen

to smoke in the face of a barrage of antismoking messages throughout her lifetime and in the face of 27 years' worth of warnings ought to be able to come in and to recover money damages. That's what the issue in this case is. This issue -- the issue in this case is not about sending messages. The issue in this case is not about ignoring common knowledge because as you will hear from Judge Nachman, common knowledge is at the core of the law, the law which required them to prove that cigarettes were more dangerous than an ordinary consumer would expect or that the risk of the product outweighed the utility of the product, which is a very complicated issue which we'll talk about in a few minutes.

They want you to send a message which you can only send by ignoring the law which Judge Nachman is going to tell you that you have to apply. They want you to send a message which you

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can only do if you ignore your common sense. They want you to send a message that if you choose to smoke, with all of the information that's been available to each of us throughout our lifetime and with all the information and the warnings which have been on the packages and in

the advertising for 25 to 31 years, that you can come into a courtroom and say, "Give me money because I made the wrong decision."

Your verdict in this case is not to be seen as an endorsement of cigarette smoking or not. It's not to be seen as sending some kind of a message. It's to be deciding this case. And if there's a message to be sent and if you are opposed to cigarette smoking, even strongly opposed to cigarette smoking, the message you don't want to send is, "Go ahead and keep smoking because there's going to be money at the end if your decision turns out to be the wrong one." That's not the message you want to send. That's the message that they're inviting you to send and it's not the right message.

This case, though, is not about messages at all. This case is about Jean Connor. This case is about the decisions which Jean Connor made throughout her lifetime, the decisions which she made despite a drumbeat of antismoking messages, a decision which she made despite a personal belief which was formed at about the time that she began smoking, if not before, that cigarette smoking caused lung cancer and did so in her

grandfather.

And she made the decision in the face of that information and then she continued to smoke for 27 years after the warnings appeared on the cigarette packages. And then, ladies and gentlemen of the jury, she chose to quit, and she quit in May 1993, the first and only time she ever tried, and she quit because she had sufficient motivation and sufficient self-efficacy in May of 1993. The motivation was to get a tummy tuck.

Mr. Wilner has told you that this case is not about whether or not cigarettes should remain a lawful product. Mr. Motley has suggested something different than that, I think, but this case is not about that because our society has made that decision. Congress has made the

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decision that so long as the warning is on the package, and now more recently on the advertising, that people are entitled to decide for themselves whether or not to smoke.

This case is not about whether or not there can be cigarette advertising because that decision too has been made. It's been made by our society. It's been made by our elected

representatives. Those aren't issues in this case. However much Mr. Motley and Mr. Wilner might like them to be issues, they are not. You don't need to decide those issues.

You need to decide the issues, the legal issues, that Judge Nachman is going to present to you, and Mr. Wilner began to outline them. There are basically two claims. They made a claim for negligence and they made a claim on what's called strict liability, and those are the issues that you need to decide, together with some affirmative defenses which we'll talk about a little bit.

But on the claims that will be presented to you, and I want to discuss some of the elements of those with you in a minute, they have the burden of proof. They've got to prove to you that they have met each and every element of each of the claims that they have presented to you. Now, ladies and gentlemen, I think that when you go back into the jury room to deliberate this case, you will agree with me that they have failed to meet their burden of proof.

With respect to their claim, they have alleged in this case that the Winston and Salem

cigarettes that Jean Connor smoked from about 1961 to 1978, perhaps to 1983, were in a defective and unreasonably dangerous condition, and they claim that those cigarettes, not the Benson & Hedges cigarettes which are not manufactured by Reynolds and never were that Jean Connor smoked from 1978 or perhaps 1983 to 1993, caused her to develop lung cancer, which in turn caused her death.

Now, there are a lot of legal terms that are wrapped up in what I just told you. The judge is going to explain them to you more fully in his charge, but I think it would be worthwhile to spend a little bit of time attempting to

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demystify some of them, because the words really don't mean what they look like -- I mean, what they sound like in lay terms.

Defective and unreasonably dangerous, and then the second part I want to talk to you about is proximate cause, which I believe the instructions refer to as legal cause. These are the issues. These are the issues which you're going to have to consider when you go back into the jury room, were cigarettes in a defective, unreasonably dangerous condition, and did that

defect or unreasonably dangerous condition proximately cause or legally cause injury to Jean Connor.

There are, as the Court will instruct you, basically two tests which you can apply to decide whether or not the product, the Winston and Salem cigarettes only, were in a defective, unreasonably dangerous condition. One is, and I'll shorthand these, the so-called consumer expectations test. The second, although it's more complicated than this, is the risk-utility test.

The first test, the consumer expectations test, asks you this question: Is this product more dangerous than an ordinary consumer would expect given the ordinary knowledge common to the community? Is it more dangerous than an ordinary consumer would expect given the ordinary knowledge common to the community? What does that sound like? That sounds like what we've been talking about in this courtroom for the past four weeks, common knowledge, virtually a synonym for consumer expectations. And rather than getting all wrapped up in that long consumer expectation definition in talking to witnesses,

we tend to refer to common knowledge.

Mr. Motley says, "You guys send a message to them. Don't hide beyond common knowledge." Ladies and gentlemen of the jury, that's the law. That's the law that they were required to prove. What he was telling you -- what he was telling you when he was up here making that argument is, "I know that we have not proved and cannot prove that element," and he was trying to

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turn that disadvantage into an advantage by condemning my client for insisting that you consider the law.

Now, in this case the evidence has shown that no other health issue in the history of this country has commanded greater attention in the public mind than the issues of smoking and health. There has been massive, continual, and unprecedented publicity throughout this century, and, indeed, even before; indeed even before my client existed. And since then there have been decades of warnings that have reinforced that public awareness.

But let me take a second and just talk to you about the risk-utility test, which you'll also be asked to consider. It is not, as it

sounds, simply a weighing of the risks and the benefits of the use of the product. There's more to it than that. But let's assume that it was limited to that, that it was simply an issue of whether or not the risks of the product outweighed the benefits of the product. Excuse me a second.

The evidence in this case is that Jean Connor made or weighed that balance herself, as set forth in the transcript of her testimony from April 30: "So the enjoyment you got from smoking cigarettes outweighed the risks that it may be hazardous?

"ANSWER: Yes."

She, like every other individual smoker, has to make that kind of an assessment for himself or herself. She made it, and I submit to you that you don't have to come in here and try to put yourself in her place, in her mind, or try to reevaluate the decisions that she made throughout her lifetime because she weighed those risks and she weighed those benefits and that's the decision that she made with respect to cigarette smoking.

Now, I mentioned to you that the test is

more complicated than that, and it really is. The judge will instruct you that there are seven factors that need to be taken into account as you attempt to apply the risk-utility test, and I believe I've been as faithful as I can to the seven factors that are set forth in the jury charge in here, and those are the seven factors.

And what you will see on here is that the

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obviousness of the danger, common knowledge, and normal expectation of danger remain as key elements of this, and indeed there's no magical formula that says that each one has equal weight; some have more weight than others.

When you get into a situation like this where you've got obviousness of danger, common knowledge, normal expectation of danger, you've got warnings that have been on packs now for 31 years, on ads now for 25 years, those factors are important. But there's another one that's very important in here and one which -- where there has, in my judgment -- strike that, Your Honor. I apologize. There has, I submit, been a complete failure of proof in this case and that is the second factor, the availability of other and safer products to meet the same need.

That element required that plaintiff present to you evidence that there was a feasible, safer, alternative design than the cigarettes that Jean Connor smoked. Feasibility means that it was technically doable; it means that it was commercially doable. Safer means that it must have been able to avoid the risk altogether, the risk of injury that was ultimately sustained by decedent, and they have got to prove that the decedent would have tried it and would have continued to use the product. There is zero evidence with respect to that in this case apart from perhaps a little speculation by Dr. Feingold, a 300,000 to $400,000 a year witness.

Let me take a second now -- and I'll talk about some of these things a little bit more fully, time permitting. Let me talk a little bit now about the second element of this. So we have consumer expectations standard. We have the risk utility which includes common knowledge and requires the feasible, safer, alternative design.

MR. WILNER: Excuse me, Your Honor. We object to misstatement of law.

THE COURT: I'm sorry?

MR. WILNER: He said it requires. It's just one of the factors. We object to him misstating the law to the jury.

THE COURT: It is -- it's a factor. It is a factor. The Court will -- members of the jury, as I indicated before, the lawyers in their

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arguments will discuss issues of evidence and issues of the law, and you must listen to them. But the evidence that you heard and that which you will consider and the law to be applied is the law as I will instruct you on it. So remember, it's not just what they say or what they say particularly, although in good faith I understand they try to bring that out to you, but the law that you will apply will be the law that I will instruct you prior to your commencement of deliberations.

MR. CRIST: Next I want to talk to you a little bit about proximate cause, and I think the instructions actually frame it in terms of legal cause, and I put proximate up there because when I went to law school, that's the word they taught me and I have trouble breaking old habits.

They've got to prove that the effective unreasonably dangerous condition proximately caused Jean Connor's injury. There are really

two parts to that, two parts to think about as you approach that. One is kind of a cause in fact. Did Jean Connor's smoking of Reynolds' cigarettes cause her lung cancer, cause in fact?

Now, what's important here, Mr. Wilner stood up here and he even flashed some overhead up here that said cigarette smoke caused Ms. Connor to develop lung cancer. That's not what you have to decide because cigarette smoke is not on trial here. Only Reynolds' cigarettes are. There are 10 to 15 years of cigarette smoking in her history after she discontinued the use of Reynolds' cigarettes. You cannot return a verdict against us of any cigarette smoking which she did after 1978 or after 1983.

Secondly, they have got to be able to show that this defect, the defective condition, that the defect caused the injury. It's not enough to say cigarettes caused the injury but they've got to show a defective condition caused the injury.

And what are the defective conditions? Well, they kind of keep changing, but I think that there are really two main defective conditions that they have to present to you, or at least they can be all kind of grouped under one of

those two, one of these two.

And with respect to defective conditions, one is lack of warning or information before '69. The second is that there was some design

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characteristic of the product that could have been made better, that there was something wrong with the way that it was designed and that there was an alternative which was available and that the alternative would have avoided her injury. And they've got to prove both of these things to you in a proximate cause, and then they've got to prove that one of the defects -- they have to prove cause in fact, but then they have to prove one of the defects then caused the injury as well.

It's not simply enough to say the cigarettes generally caused her lung cancer, but rather that some defect. And the two defects, by and large, that they've identified have been those two -- the lack -- have been the subject of most of the evidence in this case.

With respect to this proximate cause issue, and I want to talk about warnings a little bit more fully and I want to talk about design a little bit more fully, but with respect to this

proximate cause issue, what about the defective condition caused the injury? That position that Mr. Wilner and Mr. Motley have taken is definitionally based on the contention that ordinary consumers were unaware of the risks of lung cancer, the risks of smoking before 1969.

It is based also on the proposition that Jean Connor was unaware of the risks of smoking, the risks of lung cancer before 1969 because the law basically is you don't have to tell people that which they already know and there -- and you will be instructed by Judge Nachman, I believe, substantially as follows: "A manufacturer does not have a duty to warn of risks associated with its products when those risks are reasonably known to average consumers with knowledge common to the community."

In other words, there is no obligation to warn people of that which they already know. That is the law. They may want you to send a message saying, "Reynolds, you should have warned back then," but that's the law. The message they want you to send, ladies and gentlemen of the jury, is that we are perfectly prepared to ignore the law as Judge Nachman gave it to us in this

case. That's what Mr. Motley wants you to do

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here.
Now, what about those things? We're going to talk in a little bit about the awareness issue and about the warnings issue more specifically, but here with respect to whether or not a warning -- an earlier warning or a different warning before 1969 would have made a difference, what does the evidence tell us? First and perhaps most importantly, Jean Connor was exposed to 31 years or 27 years' worth of warnings and chose to disregard them. Is it reasonable to suggest that an earlier-given warning would have made a difference to her?
Secondly, I will come back as well to the cigarette design issue because there's substantial evidence that you heard in this case about that, but I wanted to also just touch real briefly on the proximate cause issue here because we know what brands of cigarettes Jean Connor tried and we know -- or smoked and what brands of cigarettes she tried and what brands of cigarettes she never attempted to try.
She smoked Winston because she snuck them from her daddy, and then she began to smoke

Salem. And we know that during the course at some point in time -- technically she tried Salem Lights, didn't like them, and resumed smoking Salems. And then at some point in time, again because of taste, she switched to Benson & Hedges Lights, probably in either 1978 or 1983, somewhere along that time frame.
But they have to prove that this hypothetical safer alternative design, which no witness has come in here and described to you in any meaningful way -- they've got to tell you that that hypothetical cigarette, that Jean Connor would have tried it, that she would have continued to use it, and that it would have avoided her injury.
MR. WILNER: Excuse me, I hate to, but counsel has repeated that same misstatement of the law, that we have to prove that. That's only one of the factors. We object.
THE COURT: Again, the jury will be guided by my instructions on the law as I will give them at the conclusion of the arguments. Go ahead.

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MR. CRIST: Thank you, Your Honor.
Now, before I move into those points, I want to take a brief detour, and I want to respond to

something that both Mr. Wilner and Mr. Motley addressed. Mr. Wilner -- and that was on the verdict form. Do we have that copy handy?
On the verdict form you'll see that there's Question No. 3 on there that deals with the statute-of-limitations issue. Mr. Wilner dismissed it as being a mere technicality. Mr. Motley ridiculed it, suggesting that Reynolds was throwing up something to try to mislead you. I remember the sequence but I don't want to get into it right now of Mr. Motley's presentation on that.
Here's what the issue is. In Florida if you suffer a personal injury you have four years in which to bring suit, and if you don't, you're time barred. You can't bring it. And in addition, if you were to die, your estate can't bring it if four years have passed.
Now, you saw the evidence develop in this case, and you heard Mr. Wilner in his opening statement, Dr. Roggli on his examination, and Dr. Feingold on his examination tell you that Ms. Connor had emphysema and that emphysema contributed or caused her death.
The medical records in this case from

February 14th, 1982, when Ms. Connor was admitted for a breast biopsy, show a diagnosis that she had emphysematous changes. 1982, that is 13 years before she brought this lawsuit, 13 years. Now, that's not the only evidence we have. There is an admission nursing assessment that was taken, I believe in connection with that very same hospital admission, and it shows that Ms. Connor reported to the intake nurse that she experienced SOB, shortness of breath, dash, smoking.
Ms. Connor knew in 1982 that she had shortness of breath due to smoking and that she was diagnosed with emphysematous changes. Now, in addition to that, the evidence from her husband, her ex-husband, Mr. Connor, which would probably be in about 1978 or so, that she was experiencing shortness of breath even at that time and that's about four years before the diagnosis of emphysematous changes.
Now, ladies and gentlemen of the jury, there can be -- despite what Mr. Wilner has told you,

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there can be no reasonable person who could conclude that the emphysema aspect of this case is not time barred. But it doesn't stop there

because we also had evidence in this case, first from Dr. Roggli, that emphysema contributed to what he described as Ms. Connor's lung cancer.

But then, ladies and gentlemen of the jury, we have this passage from Dr. Feingold: "Is there a biological link between the medical condition known as emphysema and her cancer?

"Absolutely, 100 percent."

This is the position which Mr. Wilner and Mr. Motley staked out in this case, that there is absolutely, 100 percent biological link between those two disease entities; therefore, I submit to you that this case is, in fact, barred by the four-year statute of limitations which require that it be brought within four years of diagnosis, by 1986, not 1993 or 1995 or whenever it was that it was in fact brought. 1993, I believe. In other words, it was many years overdue.

Now, having taken that brief detour, I now want to come back to what I believe the major factual issues are that you're going to have to decide. The major factual issues I think will help you decide the legal issues which the Court is going to instruct you on, consumer

expectations, risk-utility test, and the proximate cause issues. And they are the same four that I outlined to you in opening statement.

And they are, first, that there has been, throughout this century and clearly throughout Jean Connor's lifetime, a widespread if not universal awareness that cigarette smoking is or may be hazardous to health.

Maybe I can get Mr. Motley to help me with this spelling.

MR. MOTLEY: Which is it?

MR. CRIST: Widespread. This is the common knowledge point. This is the consumer expectation point. Secondly, that the warnings are adequate. As you'll be instructed, from July 1, 1969, forward, you must accept that the warnings are adequate. Plaintiffs cannot claim otherwise. But even with respect to that first warning, you may remember on opening statement I said if I were to tell you that the use of this

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pen may be hazardous to your health, you'd go huh? It doesn't tell you anything.

But on the other hand, if I were to tell you that a pack of cigarettes may be hazardous to your health, you would know what I was talking

about because those warnings never stood alone.

They were always read in context with the information which people had received from parents, from their teachers, from their Girl Scout leaders, from newspapers, from magazines, from an enormous number of other sources, television, radio, and on and on. Third, cigarette smoking is a matter of personal choice, and fourth, that people can quit.

When we came in here and we made our opening statements to you, Mr. Wilner made promises to you. I made promises to you in terms of what I thought the evidence would show, and I asked you to hold us to those promises. And I particularly asked you to hold plaintiff's counsel to their promises because they've got the burden of proof. They've got to prove to you each and every element of their claims, and I submit to you that when the day is done, you're going to conclude that they've failed to meet their burden of proof. They've failed to prove to you each and every one of the elements that are claimed.

I told you I thought this is what the evidence is going to show, and I believe -- and

we'll talk about this after lunch. I believe that you will degree with me that yes, in fact, that is what the evidence has shown.

MR. WILNER: Excuse me, improper phraseology.

MR. CRIST: With that, Your Honor, I suggest we go to lunch. I wasn't trying to express a personal opinion, Your Honor. I'm just trying to suggest the evidence has shown it.

THE COURT: All right. I understand. What the evidence has shown will be a matter that you will ultimately determine.

Members of the jury, as each of the counsel promised you at the beginning of the case, I also promised you an hour for lunch each day and

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I'm
going to go ahead and do that now. We'll be in
recess till 1:30. Counsel approach.
(Sidebar conference without the reporter.)
(Lunch recess from 12:30 to 1:30 p.m.)
(The following proceedings were held
outside
the presence of the jury:)
THE COURT: While everyone's
wandering in,
do you want me to notify you when -- you have a
total of two-and-a-half hours, of which you've
already used up about 42 minutes, give or
take.

Do you want to be notified when you've used up
two hours and you have another 30 left to go
or --
MR. CRIST: Yes, Your Honor. I think I'd
appreciate that. I'll try to keep track of it
myself.
THE COURT: Okay. Mr. Motley, will you
at
some point want me to notify you when you go
back
to the rebuttal?
MR. MOTLEY: Yes, sir. When we start
back,
Mr. Wilner and I will advise Your Honor how
we
intend to do that, and we'll ask you for a
seasonal whistle, like that.
THE COURT: I can't do -- I've always
wanted
to be able to do that and I can't.
MR. MOTLEY: Or go like this or hit us
with
that imaginary gavel.
THE COURT: All right. Recall the jury.
(The following proceedings were held in the
presence of the jury:)
THE COURT: Mr. Crist, you may
continue,
sir.
MR. CRIST: Thank you, Your Honor.
Ladies
and gentlemen of the jury, when we broke for
lunch, we had identified what I believe to be

four of the major factual issues in this case,
issues which I presented to you in my opening
statement and issues which I want to return, at
least for a few -- return to for a few minutes
now.
The evidence in this case has shown that
there has been no other health issue in history
that has commanded more attention and more
public
concern than smoking and health issues.
That's
been our common experience and that of

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course, I
think, is a matter of common sense.
You have seen in this case evidence that
dates to 1604. You'll remember the
Counterblast
of Tobacco. King James I, the same king who
is
responsible for the King James version of the
Bible, commissioned the Counterblast of
Tobacco.
And it said in 1604, almost now 400 years ago,
that smoking was a custom loathsome to the
eye,
hateful to the nose, harmful to the brain, and
dangerous to the lungs. That awareness has
continued as the centuries passed and it's been
especially heavy during the course of the 20th
century.
You heard evidence that during the 20th
century some 20 states actually prohibited --
at

the turn of the century, 20 states prohibited the
sale or use of tobacco within their borders on
both moral and on health grounds. You'll
remember Dr. Ford's testimony about Lucy
Page
Gaston, who not only had an antismoking
crusade
in the 1920s but also ran for the Republican
nomination for president of the United States
in
the mid-1920s, 1926, I believe, on a single
platform, prohibiting tobacco.
You heard about public transportation
restrictions and public facility restrictions
reminiscent of those today, but these took
place
almost a hundred years ago. You heard about
employment restrictions and employment
discrimination by people like Henry Ford,
Thomas
Edison, and John Harvey Kellogg, I believe.
Kellogg of Battle Creek's Kellogg.
And that information has continued to
inundate the public throughout this entire
century. It's come from every direction.
You've
heard and seen and you will see in evidence
information from Reader's Digest that dates
to
1924, and there have been over a hundred
articles
since then. Reader's Digest, the magazine
which
has, throughout most of the century, had the

single largest circulation of any magazine in
this country, tens of millions of people which
pass on readership to tens of millions more.
You heard the song, not the one that Dr.

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Pollay sang. You heard the song, "Smoke, smoke, smoke that cigarette, till you smoke yourself half to death." Another line in the song says, "Nicotine slaves are all the same." You heard at least part of that song by Tex Williams, as I remember, from 1947 that hit the pop charts.

You've heard about common slang terms that have become part of our culture used to describe cigarettes, coffin nails. It's been cited that that dated to at least 1912. The term "cancer sticks," Ms. Connor indicated her personal awareness of that. The term "little white slaver" Dr. Ford described to you.

You heard repeatedly, I think even in opening statement by Mr. Motley and by me, about Mark Twain: "Quitting smoking is easy. I've done it hundreds of times myself." You've heard evidence from Dr. Ford about school curricula and school textbooks being required in Florida, for example, as early as the early 1900s and continuing on up to date, and you saw from the

1920s and the 1950s evidence with respect to that.

You heard evidence about information provided by family and friends, children and spouses, and that was directly applicable as well to Jean Connor. We also heard evidence -- with respect to a request for admission, the plaintiffs admitted that Jean Connor had received similar warnings from her own personal physicians.

Now, a lot of the information that was in the public domain, frankly, was not as focused as the information which became available to the consuming public beginning in about 1950 because science really hadn't begun to focus until about 1950 on the cancer issue. You may remember having heard about a 1941 article by Drs. Ochsner and DeBakey which had a condemnation in the medical literature about smoking and cancer. And then you also saw the 1947 or 1948 series of articles by Ochsner and DeBakey in which they said, "We thought that but our research simply cannot bear it out."

It was not until the 1950s that the first epidemiological studies, the five

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epidemiological

studies, were first published and really began to rivet not only scientific information but also public attention on the lung cancer issue. And in this case you have heard that not only was scientific attention riveted on that, but in addition that the public attention became riveted upon it and that it became a matter of common knowledge.

You heard that from Dr. Ford, but Dr. Ford was not the only witness who told you that. In fact, the evidence in this case is essentially uncontroverted, undisputed that allegations about smoking and lung cancer, concerns about smoking and lung cancer had become a matter of common knowledge in 1950.

Let me show you just a couple of excerpts from testimony that you heard. Dr. Feingold: "And indeed, Dr. Feingold, the information that came out of the early epidemiology studies published in 1950, the mouse skin-painting studies in 1953, Hammond and Horn study in '54 and '57, and the Doll and Hill study and so forth were a matter of common knowledge, weren't they?

"They were widely known but less understood

by people who smoked cigarettes than by people who did not, and they were not known by all the population.

"They were a matter that were better known in the American population than any other health issue of that time or any time; isn't that correct?

"ANSWER: I think that's true."

Dr. Feingold again: "Early epidemiology studies created a tremendous commotion in the medical community, correct?

"I'm sorry, a commotion?

"QUESTION: Yes.

"Did they create a commotion?

"QUESTION: Yes.

"ANSWER: They created a great deal of interest and commentary, if that's what you mean."

"There was an enormous amount of media coverage in both electronic media as available at that time and in the print media, wasn't there?

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"ANSWER: Yes, sir, there was."
We walked through separately with Dr. Feingold virtually every piece of that evidence that came out during the 1950s in the medical

literature, and every significant development, he testified, was reported to the American public.
Showing what Dr. Cameron, scientific director of the American Cancer Society, had to say about the coverage in 1956: "Dr. Feingold, I've handed you a copy of what has been marked as Defendant's Exhibit 20 and it is an article entitled Lung Cancer and Smoking: What We Really Know, by Charles S. Cameron, M.D.
"ANSWER: Yes, it is.
"Dr. Cameron was medical and scientific director of the American Cancer Society in 1956, wasn't he?
"He was, yes.
"On page 1 in the first paragraph, Dr. Cameron writes, 'During the last two years, a lot has been written and said about the dangers of cigarette smoking, especially as a possible cause of the alarming increase in cancer of the lung,' correct?
"ANSWER: Yes.
"QUESTION: And that's a reference to the massive amount of publicity that has been given to the media, both electronic and print, to these studies that had been emerging about smoking and

lung cancer, correct?
"ANSWER: I agree."
Now, it wasn't simply Dr. Feingold and Dr. Ford who made that acknowledgment. Remember when Mr. Motley put Dr. Pollay on and Dr. Pollay was asked about whether or not in the 1952/1953 period, the vast majority of the public was aware of that risk:
"QUESTION: They would have been aware that there was an allegation of risk?
"ANSWER: Yes.
"Did you give those answers to those questions?
"ANSWER: Yes.
"So in 1952/1953 the ordinary consumer was aware of the allegation that there was a risk of

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lung cancer from smoking, correct?
"ANSWER: Yes, the distinction being aware of the allegation as opposed to being certain about the risks."
That information by Dr. Feingold's own admission, that information by Dr. Pollay's own admission was a matter of common knowledge as early as 1952 or 1953. That testimony on common knowledge, consumer expectations, and widespread

awareness was only reinforced by the testimony of Dr. Ford.
And you will remember Dr. Ford having told you and displayed to you this chart which compared public awareness in 1954 with a number of other well-known or supposedly well-known facts to the American population. Every one of them is dwarfed by the awareness of the public in 1954 about a recent report -- or have they read or heard anything about cigarette smoking may cause cancer of the lung in 1954. More people had heard that than could name the first president of the United States.
You cannot find a product in this society about which there is a higher level of awareness of the allegations of health risks than was known to the American public in 1954. It doesn't exist. Plaintiffs have presented no evidence to the contrary.
You, in addition to that poll, also received other polling evidence such as this poll which was marked as Defendant's Exhibit WWW in 1960 from Senior Scholastic which surveyed 10,763 junior and high school students from across all sections of the United States, 1960, 6-0. And it

shows that only 2.6 percent of all teenagers did not believe -- or believed that smoking had no connection with lung cancer. The converse of that is that 97.4 percent of all teenagers in the United States in 1960 believed that smoking had some connection with lung cancer. That is astronomical.
You heard testimony from Dr. Ford that even

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90 percent on any kind of a poll is almost not heard of, and yet here we are hitting, in 1960, among teenagers, of which Jean Connor was a member, 97.4 percent. There was also evidence, you will recall, from Dr. Pollay about a poll which was conducted in 1964 roughly contemporaneously with the issuance of the 1964 surgeon general's report, and in that poll, Dr. Pollay testified, after having his recollection refreshed, that 97 percent, 97 percent of Americans had seen or heard those allegations.

The 1964 surgeon general's report itself received a massive amount of media attention. That is the evidence in this case. That report led to the enactment of the Federal Cigarette Labeling Act in 1965 which took effect in 1966 and required that the congressionally drafted

warning be placed on all packages of cigarettes. We'll talk about those warnings in a minute, but for present purposes in the context of this discussion of widespread awareness is that those warnings served to reinforce in the public mind the information which they had been absolutely inundated with for decades.

Let me turn one more second -- take one more second now on this consumer expectations issue because it also applies to the issue of smoking behavior. We talked a minute ago about Mark Twain. We talked about slang terms. Well, slang terms also included references to difficulty that some people experienced in quitting.

The term "addiction" has been used. You saw it in 1906, I believe it was, in one of the Florida Health Notes. There was a reference that Dr. Ford testified that the term "nicotine fit" or "nic fit" had become common parlance early in this century, if not before. The term "little white slaver" had been in popular usage from about the turn of the century up to about 1950, he testified. But he wasn't the only one who testified with respect to that issue because Dr. Feingold also agreed.

THE COURT: Excuse me just a second.

MR. CRIST: Yes, Your Honor.

THE COURT: Mr. Raulerson, don't use the phone during argument.

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THE CLERK: I'm sorry, Your Honor. I'm trying to get someone to come up. I'm about to pass out.
THE COURT: Do you want to take a break?
THE CLERK: Someone should be up here shortly.
THE COURT: Do you want to continue?
MR. CRIST: I'll do whatever Your Honor wishes.
THE COURT: He's sick. Someone should be here in a minute.
MR. CRIST: Why don't we take a quick break.
THE COURT: We'll take a quick break.
(Pause.)
THE COURT: I'm not sure that the clerk's presence is essential to this proceeding. Would you like to go on?
MR. CRIST: I'll be happy to do so, Your Honor.
THE COURT: All right. Very well. You may continue.

MR. CRIST: And what does all this amount to? It all amounts to, as Dr. Pollay admitted, that it's difficult to believe that anybody could have grown up in the 1950s and not have been aware of this information.
Now, we know that this was true for Jean Connor as well. We know that it was true for Jacksonville. You have seen, among the exhibits presented to you, exhibits such as this, the Florida Health Notes from October of 1965: "Nearly all Floridians have heard about the surgeon general's report on smoking and health which was released in 1964." You have heard about the school textbooks, including the school textbook that was in effect in 1957: "The fact that both cigarette smoking and lung cancer have increased does not prove that smoking causes cancer, yet many doctors put most of the blame on smoking."
"The American Cancer Society" -- and this was reporting a 1957 study. "The American Cancer Society has studied the lives of 188,078 men. This is what they found. Lung cancer killed seven times as many cigarette smokers as nonsmokers." School textbooks going back to

1943, 1910, 1929, more Florida Health Notes -- I

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was looking for one in particular -- 1906, absolutely overwhelming information which was in the community in which Jean Connor grew up, which was in the schools that Jean Connor attended.

But there's more to that, because in 1961, almost coincident with the time that Jean Connor began smoking, her grandfather was diagnosed with cancer his doctors attributed to his cigarette smoking. She was told that, and she believed it. There is no more compelling message than that that can be given to anybody.

The evidence in this case also shows that as time marched on, that Jean Connor was aware of the warnings as they appeared sequentially on the cigarette packages and chose to continue to smoke. She was aware of the 1971 ban on cigarette advertising on television and radio, and this is what she said about it. At the time it was imposed, she knew about it and she knew why. And in her words, "I knew smoking was hazardous to my health." She was also aware of the Great American Smoke-Out that took place on an annual basis but she didn't participate. Why? In her words, "Because I didn't want to."

She also discussed these issues with her second husband, and you'll recall I had it up here before -- perhaps I can find it again -- that she told him, "These things are killing me," and he said, "Light up another one," and she did. Now, Mr. Wilner and Mr. Motley knew of this evidence, both with respect to the community at large and with respect to Jean Connor, but they didn't mention it, not one word. Why not?

Let me now turn to the warnings issue. As I mentioned before, I believe that the Court's going to instruct you in part as follows: A manufacturer does not have a duty to warn of risks associated with its products when those risks are reasonably known to the average consumers with knowledge common to the community, and you're going to be asked to apply that.

Mr. Wilner and Mr. Motley in this case attack my client for not having provided warnings before 1966 and for providing what they call an inadequate warning from 1966 to 1969, but let's apply -- or look at the evidence as it applies to

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what I believe the instruction to the jury is going to be. The evidence, as I've already noted, is absolutely overwhelming that there was

vast, widespread, unprecedented, and unequaled-in-the-history-of-this-country awareness and information in the public domain about the health risks of smoking.

Common sense tells you, and this instruction it tells you as well, that you need to warn about unknown risks. You don't need to tell people that if they drink too much they can get drunk and wrap themselves around a tree; they know that. Similarly, throughout that entire pre-1969 period, you didn't need to tell people about the risks of lung cancer from cigarette smoking. They were very well-known.

Secondly, the evidence in this case has been clear and consistent that whether or not there should have been a warning before 1966, it had become a societal issue. It was not one that was being simply debated in some conference room at R. J. Reynolds Tobacco Company. It was a much broader issue than that.

The evidence which you heard in this case is that the AMA, the American Medical Association, in 1952 said that the evidence was insufficient to advise people not to smoke. In 1955 -- I'm going to jump back to this in a second. In 1955

you'll remember that Dr. Ford told you that Dr. E. Cuyler Hammond, who was the chief statistician for the American Cancer Society, said on the Edward R. Murraw See It Now program -- he was asked if people ought to be warned. He said, "They are informed. They are warned. It's all in the media." AMA in 1952, Dr. E. Cuyler Hammond on See It Now in 1955.

And now we come to Dr. Cameron, who's the medical and scientific director of the American Cancer Society, and I put these questions to Dr. Feingold and this is what Dr. Feingold, plaintiff's own multi-purpose expert witness, told you on April 16th of this year.

"The issue of whether or not a warning would be helpful is an issue which came up in the 1950s, didn't it?

"Yes, sir, it did.

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"And we saw this morning the statement of Dr. Cameron in 1956, as I recall, with the American Cancer Society, took the position that it would not advise people not to smoke; do you remember that?

"ANSWER: Yes, sir.

"The same thing was said by the American

Medical Association in 1952, wasn't it?

"ANSWER: Yes, it was.

"In addition to that, Dr. Feingold, Dr. John Heller, one of his articles of which you've seen, went to the International Cancer Congress in 1958, didn't he?

"ANSWER: Yes.

"And at the International Cancer Congress in 1958 he said that the evidence was insufficient to warrant a warning, didn't he?

"I don't remember the exact words but he said things to that effect, yes."

And you will remember, because we've talked about it in opening statement and on several occasions thereafter, that in 1964 the American Medical Association -- the executive committee of the board of trustees of the American Medical Association wrote this letter saying, "With respect to cigarettes, cautionary labeling cannot be anticipated to serve the public interest with any particular degree of success. The health hazards of excessive smoking have been well publicized for more than ten years and are common knowledge. Labeling will not alert even the young cigarette smoking to any risks of which he

is not already aware."

What's plaintiff's response? Dr. Feingold came in here and he told you Dr. Heller, 1955, was wrong. Dr. Charles Cameron, American Cancer Society, was wrong. Dr. Leroy Burney and others, consistently wrong. These men who lived through that era talking about the level of public awareness, talking about the level of the necessity for a warning, every one of them was wrong. Incidentally some of these he said were wrong for other reasons, but everybody who was alive at the time, who was going through what the American public was going through at the time was, according to Dr. Feingold, wrong.

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Now, I wanted to take one more second -- I've said this before, but I want to say it again just perhaps for emphasis, and that has to do with respect to that first warning, that that warning didn't stand alone, that it really invoked in people's minds everything that they had heard before then. And indeed, looking back with perhaps the benefit of 20/20 hindsight, we can now see that that warning has become a part of our culture.

How many things have you heard described as

maybe hazardous to your health? Parenting may be hazardous to your health. Many things may be hazardous to your health. That phrase has become coined, and people are now using it in a variety of different kind of slang or common expressions because it has become so well known it's become institutionalized in the American consciousness.

That was an enormously effective warning. It may not have been as specific as Mr. Wilner may want, but it was enormously effective because it had the effect of reminding people -- and now it's taken on a secondary meaning where it's used to invoke a lot of -- it's become part of our common terminology.

Now I want to flip back real quickly once again to the issue of whether or not an earlier or different warning would have made a difference.

THE COURT: Just a moment.

MR. CRIST: Yes, Your Honor.

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